

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Amendment of Section 73.202(b),
FM Table of Allotments, FM Broadcast Stations
(Creede, Colorado)

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MB Docket No. 04-194
RM-10729

TO: Audio Division

COMMENTS OF MEADOWLARK GROUP, INC.

Meadowlark Group, Inc. (hereinafter "MGI"), by its attorney, hereby respectfully submits the following comments in opposition to the proposed allotment of Channel 261C2 at Creede, Colorado. In opposition thereto, it is alleged:

I. Meadowlark Group, Inc. and Its Interest in This Proceeding:

1. Under date of May 2, 2003, MGI filed comments and a counterproposal in MB Docket No. 03-57, suggesting the allotment of Channel 248C to the community of Creede, Colorado. In its counterproposal, MGI showed that the proposed allotment would not only provide a first local broadcast service to the community of Creede, Colorado (population 377), but would also provide service to substantial "white" and "gray" areas. The Audio Division subsequently dismissed MGI's counterproposal on the grounds that it was in conflict with an application by Jacor Broadcasting of Colorado, Inc. (hereinafter "Jacor") for a change in the facilities of FM Broadcast Station KRFX, Denver, Colorado. MGI, however, has filed a Petition for Reconsideration of the action of the Audio Division, demonstrating that the KRFX application is defective, and cannot

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be granted in its present form; and that, accordingly, the counterproposal should have been adopted. By Report No. 2659, released June 3, 2004, the Commission gave public notice of the filing of MGI's Petition for Reconsideration, and directed that oppositions to the Petition must be filed within fifteen (15) days of the date of the date of public notice of the Petition in the Federal Register.

2. In the meantime, Jacor filed its own Petition for Rulemaking, proposing the allotment of another channel, Channel 261C2, at Creede, Colorado. That proposal is the subject of the *Notice of Proposed Rulemaking* (hereinafter "*NPRM*") in this proceeding. As will be demonstrated, however, there is a problem with the proposed Channel 261C2, at Creede, Colorado. It will not work.

II. There is No Suitable Transmitter Site From Which the Proposed Channel 261C2 Allotment Can Serve the Community of Creede, Colorado

3. In its Petition for Rulemaking, Jacor specified a hypothetical transmitter site. As long as a theoretical transmitter site is shown to exist, the Commission will presume, at the allotment stage, "that it is theoretically available, and will use it as a basis for making the allotment." *Beverly Hills, Florida, et al.*, 8 FCC Rcd 2197, 2198 (MM Bureau 1993). That presumption, however, is rebuttable. See, *San Clemente, California*, 3 FCC Rcd 6728 (1988), appeal dismissed sub. nom. *Mt. Wilson FM Broadcasters, Inc.*, 3 FCC 884 F 2d. 1462 (D.C. Cir. 1989). A transmitter site is unavailable if it is subject to shadowing through intervening terrain obstacles, or if it is impossible to provide requisite city grade signal to the community of license from that site. *Hartford, Vermont*, 8 FCC Rcd 4920 (Allocations Branch, 1993). A transmitter site will be deemed unavailable, and no allotment will be made, if there is no site which would meet FAA criteria and the Commission's spacing requirements. *Pitkin, Louisiana, et al.*, 15 FCC Rcd 17, 311

(Allocations Branch, 2000) at p. 17, 313. Similarly, a transmitter site is deemed unavailable if it is located in a marsh where, presumably, construction would be impossible. *Crisfield, Maryland, et al.*, 18 FCC Rcd 19, 561 (Audio Division, 2003) at para. 3. No allotment will be made without assurance that a suitable site area exists in which a station can operate in compliance with the Rules. *Creswell, Oregon*, 3 FCC Rcd 4608 (1988), recon. denied 4 FCC Rcd 7040 (1989).

4. Attached is a statement prepared by MGI's engineer, Frank McCoy. As Mr. McCoy points out, Jacor's hypothetical site is deeply shadowed by intervening obstacles between that site and the community of Creede. Consequently, no trace of signal could possibly get through these obstacles into the community, and the site is, for that reason alone, unusable. Furthermore, the site is located in the La Garita Wilderness. The Colorado Wilderness Act of 1993 (Public Law 103-77), signed on August 6, 1993, established the Wheeler Addition to the La Garita Wilderness. The particular area in question was added to the La Garita Wilderness by Public Law 96-560, dated January 1993. Construction and commercial activities in wilderness areas are governed by Title 16, §1133 of the United States Code, entitled "Use of Wilderness Areas." Sections 1133(b) and (c) provide as follows:

(b) Agency responsibility for preservation and administration to preserve wilderness character; public purposes of wilderness areas.

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted

to the public purposes or recreational, scenic, scientific, educational, conservation, and historical use.

(c) Prohibition provisions: commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations; exceptions: area administration and personal health and safety emergencies.

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within such area.

The construction of commercial radio towers is not one of the exceptions provided for in these Sections. Accordingly, it is clear that Jacor could not obtain permission to erect a tower at its hypothetical site. It could not even obtain permission to construct a temporary road for that purpose.

5. There are, as it happens, other potential sites within the open area proposed by Jacor, which are outside the La Garita Wilderness. However, Mr. McCoy has looked at all of these other potential sites, and all of them are shadowed, and unsuitable to provide a city grade signal to the community of Creede. In short, there is no site available which will work.

6. Jacor also claims that its proposed allotment will serve white area. As Mr. McCoy points out, it will not serve nearly as much white area as the Channel 248C allotment proposed by MGI in Docket No. 03-57. In fact, it will not serve any white area if the Commission, as it should, adopts MGI's counterproposal in Docket No. 03-57, to

allocate Channel 248C to Creede. That allotment will wipe out all of the white area claimed by Jacor, and will also serve substantial white areas which Jacor's proposal could not serve, even if a suitable transmitter site could be found for that proposal.

III. Conclusion

7. As demonstrated, no viable transmitter site exists for the proposal in this proceeding. Therefore, the proposal should be dismissed without further action.

Respectfully submitted,

MEADOWLARK GROUP, INC.

June 16, 2004

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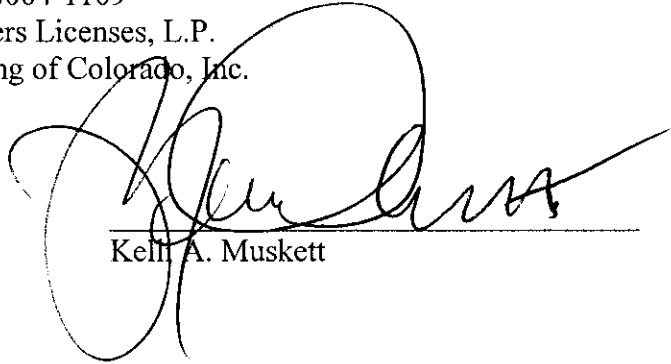
By: 

Lauren A. Colby
Its Attorney

CERTIFICATE OF SERVICE

I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 16th day of June, 2004, to the offices of the following:

Marissa G. Repp, Esq.
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555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Attorney for Citicasters Licenses, L.P.
and Jacor Broadcasting of Colorado, Inc.



Kelli A. Muskett

Affidavit and Qualifications of Technical Consultant

State of Illinois)
Community of Forest Lake) ss:
County of Lake)

Frank G. McCoy, being duly sworn, deposes and says that he is an employee of American Media Services which firm has been engaged to provide technical and other consulting in connection with the preparation of the attached.

He attended Illinois Institute of Technology in Chicago and has been active in broadcast engineering for over 25 years as an employee of and consultant to numerous FCC licensees.

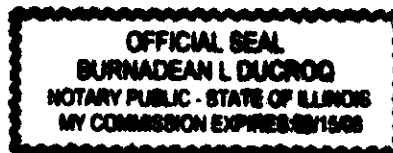
The attached Technical Narrative and the associated exhibits were either prepared by him or under his direction.

I, Frank McCoy, declare under penalty of the laws of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: June 7, 2004



Frank G. McCoy
Affiant



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